

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition by the United States Department of)	NSD-L-99-24
Transportation for Assignment of an)	
Abbreviated Dialing Code (N11) to Access)	
Intelligent Transportation System (ITS))	
Services Nationwide)	
)	
Request by the Alliance of Information and)	NSD-L-98-80
Referral Systems, United Way of America,)	
United Way 211 (Atlanta, Georgia), United)	
Way of Connecticut, Florida Alliance of)	
Information and Referral Services, Inc., and)	
Texas I&R Network for Assignment of 211)	
Dialing Code)	
)	
The Use of N11 Codes and Other Abbreviated)	CC Docket No. 92-105
Dialing Arrangements)	

**COMMENTS OF
VERIZON WIRELESS AND SPRINT PCS**

Verizon Wireless and Sprint (“Carriers”), in response to the Commission’s request,¹ renew their objections to the *Third Report and Order and Order on Reconsideration*² and jointly submit these comments in further support of their Petitions for Reconsideration of the *Order*, filed pursuant to 47 C.F.R. § 1.429.³ Verizon Wireless demonstrated that the *Order* unlawfully imposed new regulatory obligations on

¹ See Public Notice, DA 04-3219 (Oct. 8, 2004), published in 69 Fed. Reg. 63151 (Oct. 29, 2004).

² *Third Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16,753 (2000) (“*Order*”).

³ Verizon Wireless Petition for Reconsideration, CC Docket No. 92-105, March 12, 2001 (“VZW Petition”). Sprint Spectrum, L.P. d/b/a Sprint PCS Petition for Reconsideration, CC Docket No. 92-105, March 12, 2001 (“Sprint Petition”). These Petitions are expressly incorporated by reference to these Comments.

commercial mobile radio service (CMRS) carriers by forcing them to provision the 511 and 211 abbreviated dialing codes in their networks and make 511 available for the dissemination of traffic information and 211 available for the dissemination of community and referral information.⁴ Similarly, Sprint's Petition for Reconsideration demonstrated the legal and policy infirmities of the Order.⁵

The *Order* was adopted in violation of the Administrative Procedure Act ("APA") and Regulatory Flexibility Act ("RFA")⁶ and it imposed unnecessary obligations on wireless carriers that would predictably impair market forces.⁷ Essentially, Carriers' concerns can be grouped into two categories: (1) policy concerns regarding the exclusive assignment of the abbreviated dialing codes to non-commercial and/or government entities while simultaneously mandating that wireless carriers implement a new mandate; and (2) legal concerns regarding adoption of a new rule without adherence to APA rulemaking procedures and the issuance of the *Order* which is arbitrary and capricious for failure to properly consider significant points raised in comments. These concerns still remain and must be addressed by the Commission.

The *Order* indicates that because N11 dialing codes are a scarce resource, the FCC will reexamine its decisions and may consider also designating the 511 code for other uses, or removing the exclusive assignment for travel and referral services.⁸ A properly conducted rulemaking under the APA, including issuance of an NPRM and RFA

⁴ VZW Petition at 1, 5, 8. Verizon Wireless also opposed the exclusive grant of the 511 and 211 abbreviated dialing codes to government agencies and Information/Referral Providers, respectively. *Id.*

⁵ See Sprint Petition.

⁶ VZW Petition at 20-25.

⁷ This prediction is now fact. For example, some commercial mobile radio carriers like Verizon Wireless no longer offer competitive traffic services because of the government's monopoly over 511.

⁸ *Order* at ¶ 16. A similar statement is made with respect to 211 at ¶ 21.

analysis, would have examined these issues and others *before* adoption of any new obligation.

I. THE FCC COULD HAVE BEST ACHIEVED ITS POLICY GOALS BY ENCOURAGING COMMERCIAL WIRELESS PARTICIPATION IN THE ALLOCATION AND USE OF N11 CODES INSTEAD OF IMPOSING A NEW MANDATE.

Reliance on the competitive marketplace has the potential to produce superior results over government regulation. Yet, the Commission authorized a monopoly over the use of 511 and 211 by certain parties⁹ and mandated implementation of abbreviated dialing by wireless carriers for these parties' exclusive use.

Despite existing commercial applications in the marketplace that could have thrived if able to use 511 to disseminate traffic information, the Commission did not give commercial application and use of 511 a chance. The Commission could have achieved deployment of 511 through the marketplace by simply requiring that it be used exclusively for delivering traffic and transportation information without dictating the assignee (in the same way that the Commission set aside 311 for a particular purpose but stopped short of pre-determining which entities would be assigned the code). The result of the FCC's unfortunate reliance on regulation rather than the marketplace is apparent: the government-controlled 511 service has been slowly implemented. Indeed, over four years after the *Order*, government provided 511 services are available to only 22 percent of the American public, and in August 2004, generated less than one million 511 calls nationwide.¹⁰ And where the service has been implemented, it is available without competing service options. Access to travel information is not buttressed by the same

⁹ The government has exclusive use of 511; Community Information and Referral providers, usually chosen by state government, have exclusive use of 211.

¹⁰ See www.deploy511.org/usage.htm.

public interest justifications as 911 and 711 and therefore did not require a regulatory mandate to ensure uniform provisioning and baseline quality of service – 511 is a service that would have benefited from product differentiation among carriers. Moreover, wireless carriers, particularly national carriers like Sprint and Verizon Wireless, while differentiating their products from competitors, could offer ubiquitous services of uniform quality and standardized user experience — something the government has been unsuccessful in delivering.

As Sprint explained, “in comparison to a government monopoly, giving carriers the flexibility to determine the 511 traveler information made available to their customers would accelerate the rapid development of effective traveler information services”:

Because of competition, each carrier would have the incentive to offer customers the best package of traveler information available. This competition, in turn, would create competition among assemblers of traveler information, as each assembler would be incented to introduce new and more useful services and features so as to obtain additional business and visibility. Carriers would also offer ubiquitous service of uniform quality, and a Washington, D.C. customer, for example, would know in advance what information she would receive by dialing 511 while traveling in Miami or San Francisco.¹¹

Yet, the Commission rejected the Carriers’ argument and awarded government a monopoly in the provision of 511 traveler service without any discussion or analysis.¹²

By mandating that certain codes be dedicated for use by a narrow subset of potential users and by then requiring that carriers to implement these services, the FCC has sanctioned the demise of any competitive commercial services or any product differentiation based on these services. Verizon Wireless no longer offers the two traffic information services it once offered to subscribers in the Washington area,

¹¹ Sprint Petition at 8-9.

¹² This is a separate violation of the APA. See Sprint Petition at 3-4.

“SmarTraveler” and “Star-JAM” and therefore cannot differentiate its service from competitors on that basis.¹³ Verizon Wireless stands by its statements from the Petition for Reconsideration:

The Commission did not consider whether the designation of 211 and 511 as mandatory abbreviated dialing codes reserved for community information and referral services and traffic information, with required access for specific information providers, was a necessary intercession in the CMRS market. Imposition of regulatory mandates to standardize service offerings obstructs carrier operations and lessens the intensity of competition among providers. For example, if all CMRS providers must offer access to the same traffic information service provided by the same government agency on the same 511 code, there ceases to be any basis for differentiation. Providers will all offer the same, lowest-common-denominator, “government-issue” service and will no longer be able to compete as vigorously on the basis of their traffic information service offerings. As a result, the public will not see improved services and the Commission will have squandered a valuable numbering resource.

While Sprint continues to offer its wireless customers traffic and travel related information, Sprint strongly believes that its service would be far more successful and more highly utilized if it could be accessed via the 511 abbreviated dialing code. Sprint’s service is disadvantaged in the marketplace by a dialing disparity created by the government’s monopoly over 511; the FCC recognized that seven-digit dialed travel information services did not enjoy usage levels that an abbreviated dialing code could engender as part of its justification in the Order for designating 511 for government travel services.¹⁴ Certainly, the ability of carriers to use the 411 abbreviated dialing code for directory assistance serves as a tremendous example of how 511 could be commercially provisioned had the Commission not granted the government a monopoly. The directory and information services operating on 411 are highly competitive, highly innovative,

¹³ Petition at 17.

¹⁴ Order at ¶¶12 - 14, n.26, n.36.

highly utilized, and highly valued by consumers. Carriers believe that 511 could enjoy much of the same success if the government monopoly was removed.

The Commission's determination in the Order to substitute government mandates for competitive market forces was both unnecessary and counterproductive. There was no compelling factual basis for intruding into the market and requiring that access to traffic and community referral services be mandatory through abbreviated dialing procedures from wireless mobile devices.¹⁵ In today's multi-communication, multi-media environment, the public enjoys many outlets for real-time traffic information.¹⁶ What the public lost by the Commission's decision was not simply the ability to have access to a nationwide 511 service, but the ability to choose among several national 511 services as each carrier would attempt to differentiate its offerings.

II. THE FCC VIOLATED THE APA AND THE RFA.

Carriers' legal concerns raised in their Petitions and Comments have not been addressed. After failing to act on the requests to designate the use of 211 and 511 abbreviated dialing in a timely manner, the Commission rushed to issue the *Order* and implement the requirements. In doing so, the Commission violated the APA and RFA. The commission has compounded the error by allowing Petitions for Reconsideration to

¹⁵ The FCC's fact sheet indicates that 411 is unassigned. Nevertheless 411 is used nationwide by carriers for provisioning directory assistance, without a mandate and as a competitive tool. http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrc0036a.html

¹⁶ In addition to local television and radio news that provide up-to the minute traffic reports to people before they leave home and on the way to and from work, state and federal governments provide traffic data from around the nation via the internet. Without government regulation, websites such as <http://www.fhwa.dot.gov/trafficinfo/>, <http://www.travelforecast.com/htdocs/roadconditions.asp> and <http://www.smarttraveler.com/> provide a wealth of traffic information sponsored by and in partnership with government. Similarly, websites such as <http://www.211.org/> and <http://www.co.miami-dade.fl.us/MDFR/referrals.asp> provide information regarding community resources

remain unaddressed for three years in hopes of mooted these concerns with the passage of time and events. However, the defective process resulting in the current N11 obligations was not cured by ignoring legitimate opposition. Whatever desirability and administrative expediency the Commission believed existed to mandate how the two abbreviated dialing codes would be used did not diminish the need to adopt new rules consistent with the APA and the RFA.

A rule is defined by the APA as “the whole or part of an agency statement of general or particular applicability and future legal effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure or practice requirements of an agency.”¹⁷ Rules generally take two forms, interpretive rules and legislative (aka substantive) rules. Interpretive rules, which are exempt from the notice-and-comment provisions of the APA,¹⁸ are narrowly construed¹⁹ and function to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.²⁰ The mandate to implement 511 and 211 with designated parties was a new obligation, not an explanation of an ambiguous, preexisting obligation. Legislative or substantive rules are those issued under statutory authority or legislative delegation²¹ which: (1) effect a change in existing law or policy;²² (2) create

¹⁷ 5 U.S.C.A. § 551(4).

¹⁸ 5 U.S.C.A. § 553(b)(3)(A). This subsection of the APA also exempts general statements of policy, rules of agency organization, procedure, practice, or when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. None of these exceptions apply here.

¹⁹ *Reno-Sparks Indian Colony v. U.S.E.P.A.*, 336 F.3d 899, 909 (9th Cir. 2003).

²⁰ *American Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C.Cir. 1987).

²¹ *Batterton v. Francis*, 432 U.S. 416, 425; 97 S.Ct. 2399, 2405 (1977); *Reno-Sparks Indian Colony*, 336 F.3d at 909.

²² *Reno-Sparks Indian Colony*, 336 F.3d at 909.

new law, rights, or duties;²³ or, (3) impose new duties upon a regulated party.²⁴ The authority to assign an N11 code emanates from the FCC's statutory jurisdiction over the North American Numbering Plan contained in Section 251(e) of the Act.²⁵ Pursuant to that authority, the FCC designated 211 and 511 for particular uses by particular parties exclusively and required wireless carriers to implement the service upon request. The *Order* gave rise to new duties on wireless carriers to implement the service, effecting a change in existing law and policy.

In its Petition, Verizon Wireless aptly noted that the obligation to implement 511 and 211 in its networks for parties designated by the FCC was a "rule" subject to the APA as it was of binding effect²⁶ and general applicability.²⁷ Similarly, Sprint noted that the obligations imposed by the Commission in its *Order* are mandatory in character, have general applicability, and prescribe future conduct.²⁸ Indeed, the Commission itself has characterized the *Order* as containing "final rules."²⁹ Verizon Wireless correctly pointed to language from the *Order* for the conclusion that the FCC intended to bind both itself and the public:

Once we assign or designate an N11 for national use, essentially all that remains to do is to implement that assignment and monitor the uses of the N11 codes. . . . Assignment or designation involves announcement to the industry that a particular N11 code will be used for certain defined purpose(s). This announcement alerts

²³ *New York State Elec. & Gas Corp. v. Saranec Power Partners, L.P.*, 267 F.3d 128,131 (2d Cir. 2001); *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082,1087 (9th Cir. 2003).

²⁴ *Chao v. Rothermel*, 327 F.3d 223,227 (3d Cir. 2003).

²⁵ 47 U.S.C.A § 251(e).

²⁶ VZW Petition at 21 citing *Public Citizen, Inc. v. United States Nuclear Regulatory Commission*, 940 F.2d 679, 681-82 (D.C. Cir. 1991) and *United States Telephone Association v. FCC*, 28 F.2d 1232 (D.C. Cir. 1994) (reversing FCC for failure to comply with APA).

²⁷ VZW Petition at 21-22 citing 5 U.S.C. §551(4).

²⁸ Sprint Petition at 5.

²⁹ See *Third N11 Order*, 66 Fed. Reg. 9674 (Feb. 9, 2001).

current users of the N11 code that *nonconforming uses must cease* as part of the implementation process.³⁰

Similarly, Sprint noted that the Commission specifically stated with respect to the 211 code:

We *direct* that, when a provider of telecommunications services receives a request from an entity (e.g., the United Way) to use 211 for access to community information and referral services, the telecommunications carrier *must* . . . take any steps necessary (such as reprogramming switch software) to complete 211 calls from its subscribers to the requesting entity in its service area.³¹

Three years later, after having implemented 511 and 211 in the manner required, Carriers have first-hand experience that the *Order* imposed binding obligations. If the FCC did not intend to bind carriers to this outcome, and it merely designated 511 and 211 for certain uses pursuant to its plenary jurisdiction over numbering resources as suggested by some commenters, it should clarify the *Order* and allow carriers to allow additional parties (not designated by the *Order*) to use 511 and 211 for traffic and community referral services. Likewise, carriers could also choose whether or not to offer access to 511 and 211 to its customers, and could conceivably compete on that basis. Otherwise, the FCC adopted a rule that should have been preceded by notice that the FCC was considering a new and binding obligation that carriers would have to meet.³² Issuances

³⁰ *Order* at ¶ 43 & n.123 (emphasis added).

³¹ Sprint PCS Reply Comments, CC Docket No. 92-105, April 25, 2001 (“Sprint Reply”) citing *Order* at ¶ 21 (emphasis added).

³² In the 511 context, for example, the Common Carrier Bureau issued a public notice (that was not published in the Federal Register) that merely indicated that DOT had petitioned for the assignment of an N11 code (e.g., 511) and proposed that state and local governments be able to use the number to deliver travel-related information. This was not notice of a new obligation for wireless carriers, nor necessarily that 511 would be used exclusively by the government.

of public notices by the Bureau staff requesting comment on petitions received by the agency were not notice of the new 511/211 obligations that currently exist.³³

Further, the FCC violated the APA by making the rules effective immediately upon publication instead of providing the 30 days' notice after publication.³⁴ The VZW and Sprint Petitions discussed how this violation did not fit into any recognized exceptions and therefore was not excused.³⁵ Sprint's Petition for Reconsideration also stated that the Commission's failure to address Sprint's "user rules" position renders the decision arbitrary and capricious.³⁶

The failure to issue an NPRM also led to the failure to comply with the RFA. Under the RFA, the Commission is required to issue an Initial Regulatory Flexibility Analysis upon issuance of an NPRM and a Final Regulatory Flexibility Analysis when it adopts a rule under the APA. Thus, proceeding to the *Order* without an NPRM, there was no analysis for imposing the 211/511 requirement on wireless carriers or any discussion of the new obligation on any carriers, including small businesses. If the Commission had undertaken an analysis under the RFA, it may have declined to increase regulation of the wireless industry absent a clear-cut need.

III. CONCLUSION

The Supreme Court has ruled that "strict compliance with the APA" is required.³⁷ The Carriers demonstrated in their Petitions that the Commission contravened the APA in numerous ways and the *Order* is invalid as a result. In addition, the Commission's unexplained decision to award government a monopoly in the provision of 511 traveler

³³ See VZW Petition at 22-24, citing 47 C.F.R. § 0.291(g).

³⁴ 5 U.S.C.A. § 553(d)(1)-(3).

³⁵ VZW Petition at 24; Sprint Petition at 5-6.

³⁶ Sprint Petition at 3.

³⁷ *Chrysler Corp. v. Brown*, 441 U.S. 281, 312 (1979).

services given the competitive alternatives available has had the very effect that the Carriers predicted: 511 services are available to only a small percentage of the traveling public and there is no uniformity in the services in the few locations where the service is available.


For all the foregoing reasons, the Carriers request that the Commission vacate its *Third Report and Order* in this docket and hold that each wireless carrier may use the 211 and 511 codes for the provision of their own information/referral and traveler services respectively, or in partnership with government or other entities as carriers elect.

Respectfully submitted,



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